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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO PEREZ, Defendant and Appellant.	G053299 (Super. Ct. No. 13CF0897) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Ricardo Perez appeals from the judgment entered after a jury found him guilty of one count of carjacking and three counts of second degree robbery. The jury also found true the sentencing enhancement allegation that defendant personally used a firearm in the commission of the carjacking offense and in two of the second degree robbery offenses. Defendant admitted prior conviction and prior prison term enhancement allegations.

We affirm. For the reasons we explain, defendant's argument that insufficient evidence supported his conviction as an aider and abettor in the second degree robbery of Juana Perez (charged as count 4 in the amended information) is without merit. The trial court did not err by refusing defendant's request that the jury be given a pinpoint instruction stating that a pellet gun is not a firearm within the meaning of Penal Code section 16520. (All further statutory references are to the Penal Code.)

FACTS

At 10:00 a.m. on November 19, 2012, Arnold Feria manually opened the door to his garage in the alley near his Anaheim apartment building to retrieve his car to run an errand. After opening the garage door, he drove his black Honda Accord out of the garage, and left the car in park while he got out of the car to close the garage door.

As he was closing the garage door, Feria noticed a "couple," later identified as defendant and his co-defendant, Andrea Brandon, walking up the alley toward him. Feria described them as a couple because "[t]hey were walking close together, very close, like a couple would." Brandon stopped walking when she reached the front passenger side of Feria's car. Defendant continued walking to the rear of the car on the driver's side where, about three or four feet away from Feria, defendant pulled out a semiautomatic black metallic gun and aimed it at Feria, cursed at Feria in Spanish, and

said, "give [me] the car keys." While "[s]tanding there looking," Brandon did not say or do anything that would indicate she was surprised by what was happening.

Feria fumbled in his pockets, forgetting that the car key was in the ignition of his running car. Feria handed over his house keys. As defendant started to get into the driver's seat of Feria's car, and while continuing to point the gun at Feria, he demanded Feria's wallet; Feria turned over his wallet. Meanwhile, Brandon tried to open the door to the front passenger side of Feria's car. She told defendant, "let me in, let me in." Defendant leaned over to manually unlock the front passenger side door for Brandon. She opened the door, and, as she entered the car, smiled at Feria. Feria found it odd that Brandon would be so "calm and collected" to smile at him under the circumstances. Feria watched defendant and Brandon drive away in his car.

That same day, around 3:00 p.m., Sarah Arias and her mother-in-law were in the parking lot of a shopping mall, putting bags in the trunk of her mother-in-law's car, when a black Honda pulled up and parked next to them. Arias thought it odd that the car had pulled up next to them because they had parked far away from the mall and there were many empty parking spots in the area. She saw the side profile of a woman in the driver's seat; the woman did not get out of the car. Later, Arias identified Brandon as that woman in a photographic lineup.

As she was putting bags into the trunk, Arias felt someone tugging her black leather Coach purse and heard a male voice say, "give me your purse." She looked up and saw a man, whom she later identified as defendant, holding a gun with both hands. Arias released her grip on the purse so defendant could take it. Defendant took Arias's purse and got into the car on the passenger side; the car drove off.

The following morning, Juana Perez was walking in Santa Ana when a person came quickly toward her from a parking lot; Juana Perez could see a black car parked in that lot. The person said, in what sounded like a female's voice, "[g]ive me your handbag." The person pointed a gun at Juana Perez's forehead. The person then

grabbed Juana Perez's purse containing her identification, makeup, and money, ran to the black car in the parking lot, got into the driver's side of the car, and closed the car door. Two minutes later, Juana Perez saw that same person get back out of the car and start running away while holding the stolen purse. She saw a tall man get out of the front passenger seat of the car and run after the person who had her purse. The person who took Juana Perez's purse returned to the car five or ten minutes later alone and "grabbed some things out of the back seat," and "[r]eally nervously . . . took off running again." Juana Perez did not see the tall man again.

That morning, Dionicio Mendoza was cutting a lawn in the area where Juana Perez was robbed when he heard a man scream twice. Mendoza saw a man get out of a black car and shout "stop, groy, be careful."[1] He saw a woman run and the man run after her and catch up to her. Then he saw them run away together.

The black car in the parking lot was later identified as the car stolen from Feria the day before the robbery of Juana Perez. In support of the defense case at trial, a private investigator, Joseph Szeles, testified he found a pellet gun on the top shelf of a closet in defendant's mother's home.

PROCEDURAL HISTORY

Defendant was charged in an amended information with one count of carjacking Feria, in violation of section 215, subdivision (a) (count 1); one count of committing second degree robbery against Feria, in violation of sections 211 and 212.5, subdivision (c) (count 2); one count of committing second degree robbery against Arias, in violation of sections 211 and 212.5, subdivision (c) (count 3); and one count of

[1] Mendoza testified initially that he also heard the man say something to the effect of "no, no" and "what you did was wrong, stop." He later clarified, however, that he did not hear those words but just heard the man shout "stop, groy, be careful," further noting, "that's all he said."

committing second degree robbery against Juana Perez, in violation of sections 211 and 212.5, subdivision (c) (count 4).[2] As to counts 1, 2, and 3, the information alleged pursuant to section 12022.53, subdivision (b) defendant personally used a firearm within the meaning of sections 1192.7 and 667.5. The information further alleged, pursuant to section 667, subdivisions (d) and (e)(1) and section 1170.12, subdivisions (b) and (c)(1), that he was previously convicted of a serious and violent felony and a strike offense and had served two prior prison terms within the meaning of section 667.5, subdivision (b).

The jury found defendant guilty of all four counts and found the personal use of a firearm sentencing enhancement allegations true. Defendant admitted the prior conviction and prison term enhancement allegations. The trial court sentenced defendant to a total prison term of 32 years four months. Defendant appealed.

DISCUSSION

I.
SUBSTANTIAL EVIDENCE SUPPORTED DEFENDANT'S CONVICTION ON COUNT 4 ON A THEORY OF AIDING AND ABETTING.

With regard to the robbery of Juana Perez, charged as count 4 in the amended information, defendant does not argue there was insufficient evidence a robbery had occurred or that defendant was present at the scene of that robbery. He solely argues there was insufficient evidence he aided and abetted that robbery. For the reasons we explain, defendant's claim lacks merit.

The aiding and abetting doctrine that "one may be liable as an aider and abettor 'when he or she aids the perpetrator of an offense, knowing of the perpetrator's unlawful purpose and intending, by his or her act of aid, to commit, encourage, or

[2] The information also charged Brandon with counts 1 through 4, and charged Brandon alone with additional counts of receiving stolen property in violation of section 496, subdivision (a) and of theft of lost property in violation of section 485. Brandon is not a party to this appeal and is only referenced to provide relevant background information.

facilitate commission of the offense, "snares all who intentionally contribute to the accomplishment of a crime in the net of criminal liability defined by the crime, even though the actor does not personally engage in all of the elements of the crime." [Citation.]' [Citation.] Aiding and abetting does not require participation in an agreement to commit an offense, but merely assistance in committing the offense." (*People v. Morante* (1999) 20 Cal.4th 403, 433.)

Substantial evidence showed defendant aided and abetted the robbery of Juana Perez. Defendant and Brandon together successfully carjacked and robbed Feria at gunpoint the previous morning, and robbed Arias later that afternoon. The next morning, Brandon approached Juana Perez while defendant waited for Brandon in the black car which was parked in a nearby parking lot. After Brandon returned to the black car with the purse, she got inside and closed the car door. Two minutes later, Brandon got out of the car and started running away. Defendant shouted "stop, groy be careful" and ran after her. When he caught up to her, he did not stop her but continued to run away from the scene of the robbery with her. Defendant never returned to the car. Thus, defendant's participation in the robbery of Juana Perez extended beyond his mere presence.

In his opening appellate brief, defendant cites evidence that he appeared angry at Brandon as she fled the scene as showing that "Brandon impulsively decided to steal Perez's purse without consulting [defendant] and that he was angry with her for making such a risky move." We cannot reweigh the evidence. And no evidence shows why Brandon ran away from the car or why defendant shouted at her. The jury found defendant aided and abetted the robbery of Juana Perez and substantial evidence supported that finding.

II.
THE TRIAL COURT DID NOT ERR BY FAILING TO GIVE A PINPOINT INSTRUCTION REGARDING PELLET GUNS.

Defendant contends the trial court erred by denying his request to give a pinpoint instruction to the jury stating that a pellet gun is not a firearm in light of evidence that a private investigator found a pellet gun in defendant's mother's linen closet which Szeles said looked like a semiautomatic handgun. Defendant's argument is without merit.

A defendant is entitled, on request, to instructions that "pinpoint" the theory of the defense case. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142; *People v. Canizalez* (2011) 197 Cal.App.4th 832, 856.) However, when the pattern instructions fully and adequately advise the jury on a particular issue, a pinpoint instruction on that point is properly refused. (*People v. Canizalez, supra,* 197 Cal.App.4th at p. 857.)

Here, the trial court instructed the jury with CALCRIM Nos. 3115 and 3146, in each of which the following definition of a firearm was provided: "A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel *by the force of an explosion or other form of combustion*." (Italics added.)

At trial, Szeles testified as follows regarding a pellet gun:

"Q . . . [Y]ou said this was a pellet gun. How do you know that this item is a pellet gun as opposed to a firearm?

"A The base of what would be the magazine *is threaded for a compressed air cartridge to go into the magazine, which is what is used to propel the pellet out of the weapon.*

"Q Okay. Is there anywhere on that particular item to put real bullets?

"A No, there's not. There is no firing pin. It could not be used as a handgun with bullets." (Italics added.)

The trial court denied defendant's request that the jury be given the following pinpoint instruction: "A pellet gun is not a firearm, pursuant to Penal Code section 12022.53(b)."

The trial court did not err. Defendant's pinpoint instruction that pellet guns are not firearms was properly refused because CALCRIM Nos. 3115 and 3146 fully and adequately advised the jurors on the definition of a firearm. Szeles's testimony established that a pellet gun would not fall within that definition because compressed air propels pellets out of a pellet gun; they are not discharged via combustion or an explosion. As defendant's pinpoint instruction was unnecessary, the trial court did not err in refusing to give it. (*People v. Bolden* (2002) 29 Cal.4th 515, 558 [a trial court need not give a pinpoint instruction that merely duplicates other instructions].)

Even if the trial court erred in refusing to give defendant's proposed pinpoint instruction, defendant suffered no prejudice. Under *People v. Watson* (1956) 46 Cal.2d 818, 836, "a 'miscarriage of justice' should be declared only when . . . it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." In this case, it was not reasonably probable that a result more favorable to defendant would have been reached in the absence of the alleged error. During closing arguments, defendant's trial counsel reiterated that a pellet gun does not qualify as a firearm for purposes of the firearm sentencing enhancement allegations. Defendant's trial counsel stated: "No gun was ever recovered in this case. No firearm," and added that a pellet gun, however, was found at defendant's home. Defendant's counsel stated, "you must make a separate decision of whether the People have proven that he used a firearm. Again, a firearm has a specific term. Ain't a pellet gun, ain't a paintball gun. It has to be a gun that shoots bullets through explosion. A

pellet gun is not a firearm." The prosecutor did not argue otherwise. On this record, even assuming error, defendant suffered no prejudice.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.